Court of Appeals No. 26996-5-III

No. 84003-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALBERTO PEREZ-VALDEZ,

Petitioner.

PETITION FOR REVIEW

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted:

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I. SUPPLEMENTAL FACTUAL STATEMENT

The Petitioner/Defendant Alberto Perez-Valdez was convicted by a jury of the second and third degree child rapes of A.V. and S.V.. CP 29, 75. He complains that an expert witness invaded the province of the jury by responding to defense counsel's question regarding the veracity of the child victims. Petition for Review at 17.

Karen Patton testified at Mr. Perez-Valdez's trial that she had worked for many years at Child Protective Services, primarily investigating allegations of sexual abuse and often working with police. RP 282, 286. She developed a standard forensic interview procedure for children in which she would establish rapport, test the child's competency, ask open-ended questions, and employ a body map. RP 284-85. After interviewing the child, she would interview the parents and then counselors, doctors, teachers or others who might have information. RP 286. She would investigate the location where the offense was alleged to have occurred. RP 286.

A.V. told Ms. Patton that Mr. Perez-Valdez began molesting her in the third grade and began having intercourse with her in the fifth or sixth grade. RP 293. For the last few years, he had engaged in intercourse with her six or seven times a month in various rooms in the house. RP 293-94. S.V.

similarly reported that the Defendant began touching and grooming her and then began having intercourse with her. RP 296. A.V. had tried to tell her foster mother two or three times, but the foster mother had summoned her adult children to yell at A.V. and S.V. and accuse them of lying. RP 294. A.V. also got hit quite a lot. RP 297.

Ms. Patton described that she viewed the Perez-Valdez home and confirmed the children's description of the rooms. RP 301. Defense counsel asked why the accuracy of the location was significant, and Ms. Patton explained that some parents do not allow children into their bedrooms, which is a private space, yet these foster children were intimately acquainted with the rooms. RP 301.

> A. ... So I'm saying these children knew what the parents' bedroom looked like, and in addition, they were in there several times being sexually abused by their father.
> Q. Assuming they are telling the truth?
> A. They are telling me the truth.

RP 301-02. Defense counsel immediately objected and asked for a mistrial. RP 302. The court sustained the objection and instructed the jury to disregard the comment, but denied the mistrial. RP 302.

In addition, the court instructed the jurors that they were "the sole judges of the credibility of the witnesses and of what weight is to be given to

the testimony of each." RP 372. The judge further instructed them on the use of expert testimony.

> A witness who has special training, education, or experience in a particular science, profession or calling may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider among other things the education, training, experience, knowledge, and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the facts already given you for evaluating the testimony of any other witness.

RP 378.

V. SUPPLEMENTAL ARGUMENT

A. THIS COURT SHOULD ABOLISH THE USE OF THE PHRASE "INVASION OF THE PROVINCE OF THE JURY."

The Defendant's particularly challenge to opinion testimony, which "invades the province of the jury," is a challenge that is used primarily in child sexual abuse prosecutions, where expert opinion is most necessary and most helpful. The outdated expression attempts to exaggerate challenges that are truly evidentiary in nature and are best left to the discretion of trial judges.

1. Child sexual abuse prosecutions present unique problems of proof.

Our legislature has ranked sexual assault against children among the most serious of felonies. Under the Sentencing Reform Act, first degree child

rape is of equal seriousness level as both first degree assault and first degree rape. RCW 9.94A.515. This is not surprising, given the prevalence of these crimes and their devastating effects.

By most counts, one in every three women in the Unites States was the victim of sexual assault as a child. Gail E. Wyatt et al., *The Prevalence and Circumstances of Child Sexual Abuse: Changes Across a Decade*, 23 CHILD ABUSE & NEGLECT 45, 54 (1999). These victims will suffer both short term and long term effects, which in many cases will render them emotional cripples for life. Victims of abuse which involves penetration, such as the victims in the instant case, will suffer more greatly than others, but all victims of child sexual abuse are at greater risk of a broad range of mental diseases. Former Surgeon General C. Everett Koop described the consequences of child sexual abuse as "overwhelming." C. Everett Koop, U.S. Dep't. of Health & Human Servs., The Surgeon General's Letter on Child Sexual Abuse (1988). Victims of child sexual abuse consistently suffer greater depression, anxiety, and other psychiatric symptoms. They also have higher rates of drug and alcohol abuse and are at higher risk to suffer additional victimizations. David Finkelhor et al., *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion and Attitude*, J. OF

INTERPERSONAL VIOLENCE 379, 379 (1989). Short term effects can include anxiety, fear, nightmare and sleep problems, poor self esteem, post traumatic stress disorder, and somatic complaints including stomachaches and headaches. John E. B. Myers, Evidence and Child Abuse and Neglect Cases, § 503, 419-426 (1997). Victims like A.V. and S.V. who have been penetrated are even more likely to suffer serious side effects. Ferole E. Mennen & Diane Medow, *The Relationship of Abused Characteristics to Symptoms and Sexually Abused Girls*, 10 J. OF INTER PERSONAL VIOLENCE 259 (1995).

Unfortunately, these cases also present unique problems of proof. As this Court has observed:

> Acts of abuse generally occur in private and in many cases leave no physical evidence. Thus, prosecutors must rely on the testimony of the child victim to make their cases. Children are often ineffective witnesses, however. Feeling intimidated and confused by court room processes, embarrassed at having to describe sexual matters, and uncomfortable in the role as accuser of a defendant who may be a parent, other relative or friend, children often are unable or unwilling to recount the abuses committed on them. In addition, children's memory of abuse may have dimmed with the passage of time. For these reasons, the admissibility, of statements children make outside the court room, and especially statements made close in time to the acts of abuse they describe, is crucial to the successful prosecution of many child sexual offenses.

State v. Jones, 112 Wn.2d 488, 494, 772 P.2d 496 (1989).

The United States Supreme Court reached the same conclusion in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). There, the Court noted that child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are usually no witnesses except the victim. Child victims find the court room a forbidding place, and the experience of testifying against a familiar person, especially a loved one, can be overwhelming. Consequently, children's testimony is often ineffective and difficult for jurors to evaluate.

The problems of ineffective testimony and lack of eyewitnesses are compounded by the paucity of physical evidence in many child sexual abuse cases. *Doe v. United States*, 976 F.2d 1071, 1074 (7th Cir. 1992), *cert. denied* 510 U.S. 812 (1993).

In recent years, these difficulties have been enhanced by defense tactics, which focus on media coverage about the suggestibility of children and the possibility of coaching. Another problem is the exposure of jurors to crime programs on television, which often lead to unrealistic expectations of forensic corroborative evidence that is simply unavailable in child abuse cases. Kit R. Roane, *The CSI Effect*, U.S. NEWS & WORLD REPORT, April 25,

2005, at 49-54.

2. The rules of evidence allow both expert and lay opinion testimony to assist the jury in understanding aspects of child sexual abuse and its investigation, which are beyond common understanding.

Evidence Rule 702 allows expert testimony, opinion or otherwise, which will assist the trier of fact in understanding the evidence or determining a fact in issue. Similarly, lay witnesses may express opinions, which are rationally based upon their own perceptions and helpful to a clear understanding of others' testimony or the determination of any factual issue ER 701.

Some examples of lay opinion testimony which have been approved by our appellate courts include: an officer's opinion that the defendant in a DUI case was obviously intoxicated and could not drive a motor vehicle in a safe manner (*City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993)); an opinion on the cause of death in a homicide prosecution (*State v. Cunningham*, 23 Wn. App. 826, 598 P.2d 576 (1978) *rev'd on other grounds* 93 Wn.2d. 823 (1980)); an opinion on the sanity or insanity of a criminal defendant (*State v. Putzell*, 40 Wn.2d 174, 254 P.2d 180 (1952)); an opinion that the defendant charged with the possession of cocaine with intent to deliver was "involved in the transaction or [ ] running the show" (*State v.*

Fisher, 74 Wn. App. 804, 874 P.2d 1381 (1994)); a physician's opinion in an assault prosecution that cuts on the victim's face were inflicted deliberately (*State v. Baird*, 83 Wn. App. 477, 922 P.2d 157 (1996)); and a coroner's opinion in a murder trial that the defendant was "sighting right down the gun when it went off" (*State v. Read*, 100 Wn. App. 776, 998 P.2d 897 (2000), *aff'd* 147 Wn.2d 238 (2002)).[1]

The same principles governing these cases should apply as well to cases involving sexual abuse of children.

3. Expert testimony assists a jury to determine the issues and does not offend the jury right.

The need for expert testimony on the ultimate issues is particularly great in cases where the victim is a child. As noted above, medical evidence of sexual abuse exists only in a minority of cases. Jan Bays & David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE

[1] This is not to say, however, that there are no limits to the expression of opinions. It remains true that it is improper for a witness to testify to an opinion that constitutes a *legal* conclusion. Such improper legal conclusions may include testimony that a particular law applies to a case, or testimony that the defendant's conduct violated a particular law. *State v. Olmedo*, 112 Wn. App. 525, 49 P.3d 960 (2002) *review denied* 148 Wn.2d 1019 (2003)). Trial courts also retain the discretion to exclude opinion testimony that is not supported by an adequate foundation (*See State v. Black*, 109 Wn. 2d 336, 348, 745 P.2d 12 (1987)) or because the testimony may overwhelm the jury with an aura of scientific reliability. *See State v. Saldana*, 324 N.W.2d 227, 229-30 (Minn. 1982); *State v. Taylor*, 663 S.W. 2d 235 (Mo. 1984). But these cases stand for the proposition that improperly admitted opinion testimony is excluded because it is irrelevant or unduly prejudicial, not on the grounds that the evidence somehow prevented the jury from performing its appointed function in a trial.

& NEGLECT 91, 92 (1993). Several factors explain the lack of physical evidence in child sexual abuse cases. Many abusive acts (for example, fondling, kissing, fellatio, cunnilingus and the use of a child in pornography) leave no marks. Penile penetration often, although not invariably, fails to injure the hymen or leave any physical signs. Joyce A. Adams & Sandra Knudson, *Genital Findings in Adolescent Girls Referred for Suspected Sexual Abuse*, 150 ARCHIVES OF PEDIATRIC & ADOLESCENT MEDICINE 850 (1996). Injuries in the genital area may heal so rapidly and completely that no physical evidence remains when the child is examined. Jan Bays & David Chadwick, *supra*, at 95; *see also*, John E.B. Myers, *supra*, § 5.20 at 494-95.

This is counterintuitive to most jurors. Jurors expect that certain types of sexual abuse necessarily cause physical injury. *See* Susan Morrison & Judith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 CHILD ABUSE & NEGLECT 595, 607 (1992). They are entitled to learn that it does not.

An examining physician may testify that his objective findings are consistent with sexual abuse. *See State v. Young*, 62 Wn. App. 895, 906-07, 802 P.2d 829, 817 P.2d 412 (1991). Where there is no medical evidence of abuse, a physician may assist jurors by informing them that a lack of physical

findings is consistent with the history of abuse. *See Kosbruk v. State*, 820 P.2d 1082, 1086 (Alaska Ct. App. (1991) (experienced police officers allowed to testify that it was common for a sexual abuse complaint to be uncorroborated by medical evidence); *People v. Rowland*, 841 P.2d 897, 914 (Cal. 1992) (proper for prosecutor to offer expert testimony to the effect that the absence of genital trauma is not inconsistent with non-consensual intercourse); *Turner v. Commonwealth*, 914 S.W. 2d 343, 344 (Ky. 1996) (not error to allow two physicians to testify that absence of tears or other physical injury did not necessarily indicate that the sexual abuse complained of did not occur).

Moreover, a treating physician in a sexual assault case may express an opinion that the victim had been sexually assaulted. *State v. Young*, 62 Wn. App. at 906-07; *State v. Jerrels*, 83 Wn. App. 503, 506, 925 P.2d 209 (1996); *Turner v. Commonwealth*, 914 S.W.2d. 343 (Ky.1996); *State v. Shaefer*, S.W.2d 504 (Mo. Ct. App.1993); *People v. Cegers*, 9 Cal.Rptr.2d 297, 303 (Cal. Ct. App. 1992); *State v. Bingham*, 776 P.2d 424 (Idaho 1989); *Glendening v. State*, 536 So.2d 212 (Fla. 1998); *State v. Miller*, 117 N.W.2d 447 (Iowa 1962); *State v. Cox*, 215 N.W. 189 (Minn. 1927). This is because physicians' diagnoses are routinely admitted. Karl B. Tegland, Washington

Practice: Evidence Law and Practice § 702.29 (4th ed. 1999); *State v. Barton*, 5 Wn.2d 234, 243-44, 105 P.2d 63 (1940). Physicians testify about how particular wounds were inflicted, and child sexual abuse is a recognized medical diagnosis. Jan Bays & David Chadwick, *supra*, at 92; Dupowitz Black & Harrington, *The Diagnosis of Child Sexual Abuse*, 146 AMERICAN J. OF DISEASES OF CHILDHOOD 688 (1992).

When, as occurs in the majority of the cases, the physical examination discloses no medical evidence of sexual abuse, the child's interview becomes extraordinarily important. *See*, Martin A. Finkle & Alan R. DeJong, *Medical Findings in Child Sexual Abuse and Child Abuse*; MEDICAL DIAGNOSIS AND MANAGEMENT 185, 189 (Robert Reece ed., Lea & Febiger 1994) (Historical indicators are the most important in sexual abuse, and a child's direct statement describing sexual abuse is the most definitive historical indicator of abuse); Robert Reece, *Comment*, QUARTERLY CHILD ABUSE MEDICAL UPDATE (Mar. 1994) (it is now generally agreed that the child's history and behaviors are the most important elements in the diagnosis of child sexual abuse); Marsha E. Herman-Giddens & Thomas E. Frothingham, *Prepubertal Female Genitalia: Examination for Evidence for Sexual Abuse*, 80 PEDIATRICS 203, 208 (1987) (Because normal findings do not rule out sexual

abuse, the interview remains the most critical factor in establishing whether or not sexual abuse or exploitation has occurred).[2]

An expert's interpretation of that history does not become inadmissible simply because the jury may infer from that testimony that another witness is or is not telling the truth.

4. Expert testimony cannot invade the province of the jury.

The Defendant is seeking to overturn his conviction by elevating a rationale long ago discarded by authorities as nonsensical to the status of constitutional doctrine. *Hopkins v. State*, 480 S.W.2d 212, 220 (Tex. Crim. App. 1972). The time has come to excise the phrase "invades the province of the jury" from the lexicon of Washington judges. The instant case affords this Court an opportunity to do so.

While lofty in tone, the phrase really has no meaning and, therefore, cannot even be termed a rule. This was recognized long ago by at least one respected authority:

> A phrase, often put forward as explaining why the testimony we are concerned with is excluded, declares that the witness,

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[2] The importance of history is not confined to conditions arising from sexual abuse. A number of diseases cannot be detected by physical examination, and doctors must rely upon medical history to arrive at a diagnosis and to recommend treatment. Angina pectoris is an example of a disease that may not be apparent on physical examination. *See* Merck Manual of Diagnosis & Therapy 489 (R. Berkow ed., 14th ed.) (1982).

> if allowed to express his "opinion," would be "usurping the function of the jury." In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to "usurp" the jury's function; nor could he if he desired. He is not attempting it, because his error (if it were one) consists merely of an offering to the jury a piece of testimony which ought not to go there; and he could not usurp it if he would, because the jury may still reject his opinion and accept some other view.

John H. Wigmore, 7 Evidence at Common Law §1920 at 18-19 (James H. Chadbourn ed.)(1978); *see also* Edward W. Cleary, McCormick on Evidence § 12 (3d ed.1981).

The phrase "invasion of the province of the jury" at common law was neither a doctrine nor rule, but simply an explanation of the rationale behind the common law evidentiary rule against the admission of expert testimony on ultimate issues. *See DeGroot v. Winter*, 247 N.W. 69 (Mich. 1933). The phrase was often misapplied to opinion testimony because it was easily confused with the generally accepted rule that expert opinion should not be heard on commonplace matters. *Rieth-Riley Constr. Co. v. McCarrell*, 325 N.E.2d 844, 852 (Ind. App. 1975).

Congress rejected the ultimate issue rule when it promulgated the Federal Rules of Evidence. *See* FED. R. EVID. 704(a). When it did, the

advisory committee made clear in their notes that they were rejecting the notion that evidence can invade the province of the jury:

> The older cases often contained strictures against allowing witnesses to express opinions on ultimate issues... The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier fact of useful information. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is characterized as "empty rhetoric."

FED. R. EVID. 704, Notes of Advisory Committee on Rules (citations omitted).

The language of the Washington rule governing opinions on ultimate issues is identical to that of FED. R. EVID. 704 (a), and the Comment is similar. ER 704.

> This rule is the same as Federal Rule 704 and is consistent with previous Washington law. In rejecting challenges that opinions should have been excluded because they were opinions on ultimate facts, the court has permitted opinions to be voiced upon various matters.

ER 704, Comment.

Because ER 704 is taken almost verbatim from the FED. R. EVID. 704 (a), in interpreting the provisions of the Washington rule it is proper to look at the federal rule's history and purposes. *State v. Smith*, 97 Wn. 2d 856, 651 P.2d 207 (1982); *State v. Burton*, 101 Wn. 2d 1, 676 P.2d 975 (1984). The

most reasonable interpretation of the Washington rule is that it, like its federal counterpart, intends to reject the notion that testimony can invade or usurp the jury's province along with the notion that opinion testimony on ultimate issues is improper.

It is not surprising that the drafters of the evidence rules should seek to abolish the notion that evidence invades the province of the jury. This Court has explained the basis of the rule:

> Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence "violates (the defendant's) constitutional right to a jury trial, including the independent determination of the facts by the jury."

State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(citation omitted).

But neither this Court nor any other court can explain how the introduction to evidence can prevent the jury from making an independent determination of the facts. It is impossible for opinion evidence to usurp the jury's function, because even if there is uncontradicted expert testimony on the victim's credibility or any other issue, the jury is not bound by it.[3] *City of*

[3] While witnesses cannot invade the province of the jury, judges can do so in a number of ways. For example an appellate court invades the province of the jury by determining questions of credibility and weighing of evidence. *See Goldman v. United States*, 245 U.S. 474, 38 S.Ct. 166, 62 L.Ed. 410 (1918). A court's instruction to the jury which comments on the evidence can also invade the jury's province. *State v. Brown*, 178 Wash. 588, 599, 35 P.2d 99 (1934).

Seattle v. Heatley, 70 Wn. App. at 583, n.5; *State v. Middleton*, 657 P.2d 1215, 1219 (Or. 1982). Jurors always remain free to draw their own conclusion. *City of Seattle v. Heatley*, 70 Wn. App. at 583, n.5.

This is particularly true here because the court instructed the jurors that they were the sole judges of credibility of the witnesses and the weight of the testimony. CP 372. The Court further instructed the jurors that they were not bound by expert witnesses' opinions, but rather were to determine the credibility and weight to be given such opinion evidence. CP 378. This Court has found such standard instructions relevant in a claim of judicial comment on the evidence. *State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) The jurors are presumed to have followed the court's instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). As Judge Learned Hand observed, "Juries are not leaves swayed by every breath." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

This Court has held that necessary expert testimony does not invade the province of the jury. *State v. Richardson*, 197 Wash. 157, 84 P.2d 699 (1938). This Court has also held that expert testimony on the cause of a car crash does not invade the province of the jury, because the expert is better qualified to reach a conclusion about the cause of the crash then the jurors.

Knight v. Brogan, 52 Wn.2d 219, 324 P.2d 797 (1958). If the evil of evidence which usurps or invades the province of the jury is that it prevents independent determination of the facts by the jury, the "rule" is not consistent with the above decisions.

Because the application of the "rule" against invasion of the province of the jury seems to be applied ***only to cases involving the sexual abuse of children***, and because the rule serves no real purpose and has been rejected by the drafters of the evidence rules, this Court should now explicitly reject and repudiate the phrase "invasion of the province of the jury" as other courts have done. *See State v. Middleton*, 657 P.2d 1215 (Or. 1982); David McCord, *Expert Psychological Testimonial about Child Complaints in Sexual Abuse Prosecution: a Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 24-25 (1986).

B. MS. PATTON'S STRICKEN TESTIMONY DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL.

Essentially, the Defendant is claiming that Ms. Patton's single responsive statement to defense counsel, a statement which was immediately objected to and stricken, was so prejudicial that it deprived him of a fair trial. Petition for Review at 15. This argument simply is untenable.

As the trial court explained, defense counsel was "complicit" in Ms.

Patton's testimony. RP 442. The witness did not express her belief as to the children's credibility under direct examination. It was under cross-examination, when the investigator was baited with the question "assuming they are telling you the truth," that her comment came out. RP 302, 442. Ms. Patton was the State's last witness. RP iii. Counsel elicited this comment after fourteen other witnesses had testified, including after the children had already endured the trauma of testifying. RP i-iii, 47-122. It is easy for a legal expert to elicit improper testimony from a witness. Defense counsel attempted to cause a mistrial after the State and all the State's witnesses had completed the hard work of presenting a case. The judge was not wrong to term this "complicity," however, the term more commonly used is "invited error." *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990) (The invited error doctrine prohibits a party from introducing error at trial and then challenging it on appeal); *Rao v. Auburn General Hospital*, 19 Wn.App. 124, 130, 573 P.2d 834 (1978) ("Invited error precludes judicial review.").

Whatever error counsel may have attempted to seed into the record, the court's immediate response cured any prejudice. Defense counsel's immediate objection was immediately sustained. RP 302. The prosecutor did not intervene. This served to instruct the jury that the statement was

improper in a way that was obvious or apparent.

The court then instructed the jurors that they alone made credibility determinations and that even the opinion of an expert was not binding on the jury. RP 372, 378. Because jurors are presumed to follow court instructions (*State v. Warren*, 165 Wn.2d at 28), there can be no prejudice.

It is preposterous that the fact that the state's witnesses, particularly lead investigators, have an opinion about the merit of the state's case should be determinative of the jury's verdict. In fact, it is improbable that the jury had not already discerned that opinion merely by the witnesses' roles. Ms. Patton was the CPS investigator. Her investigation and conclusion would necessarily shape the prosecutor's charging decision and very likely bring about that decision. A decision to charge a person with such a serious crime is not made lightly or without conviction on the part of the state's main players. It is, therefore, not helpful to the jury for the state's witnesses or state's attorney to further express their opinions. Their position is clear by the very fact that they are involved in a prosecution.

Almost any assertion can be framed in constitutional terms. Ms. Patton's testimony is properly framed as merely a question of evidentiary admissibility. The court properly struck the opinion, which was ***unhelpful*** to

the trier of fact and therefore inadmissible under ER 701 and 702. Her comment cannot be said to have stated a conclusion that the jury could not have reached by itself or to have overwhelmed the jury with an aura of scientific reliability. *See, e.g., State v. Saldana, supra; State v. Taylor, supra.* The witness was goaded into expressing an opinion that was obvious from her role and no surprise to the jury.

The State's case was strong. There were ***three victims*** alleging separate incidences of rape over different periods of time. There was ***physical evidence*** corroborative of forced intercourse and penetration. RP 143-45 (posterior disruption of A.V.'s hymen indicated a full length tear that had not healed and was consistent with an object being pushed through the hymen); RP 148 (S.V.'s hymenal opening was stretched sufficiently to allow the penetration of a penis); RP 134 (there was medical evidence that the uncharged victim had been sexually active at the age of eight). The uncharged victim was in counseling after alleging that she had been molested by the Defendant years before and after the State removed her from the Defendant's foster home. RP 131. The two victims (related to the charges) had consistent histories, describing identical details. Unpublished Opinion at 2. They were witnesses to each other's rapes. RP 51-52. They reported the

assaults to several responsible adults, including counselors, police, CPS, and another foster mother. Their affect was consistent with trauma. RP 131, 162-64, 181, 183. They were able to describe in detail the Defendant's private room. RP 299-301.

The simple statement, which was elicited by defense counsel and immediately stricken, did not prejudice the Defendant's right to a fair trial.

III. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: February 15, 2011.

Respectfully submitted:

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Deputy Prosecuting Attorney